Supreme Court, U.S.
FILED
MAY 9 1997
CLERK

(5)

No. 96-1433

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARION S. BARRY, JR., *et al.*,

Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MARCIA ROBINSON LOWRY
Counsel of Record
CRAIG LEVINE
CHILDREN'S RIGHTS, INC.
404 Park Avenue South, 11th Fl.
New York, New York 10016
(212) 683-2210 (ext. 324)

Of Counsel

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

THOMAS J. MIKULA
SUSAN L. PACHOLSKI
A. CHRISTOPHER BRYANT
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

May 9, 1997

43 pp

QUESTIONS PRESENTED

I. Whether the court of appeals properly exercised its discretion to rule on pendent claims for injunctive relief against the District of Columbia regarding the District's child welfare system, in order to avoid resolving complex constitutional and federal statutory issues, after substantial judicial resources had already been expended in conducting a full trial on the federal and local law issues, and plaintiffs had prevailed on all those grounds.

II. Whether the district court properly re-entered a consent decree that exceeds the requirements of local law, where the District of Columbia had negotiated and agreed to be bound by the decree even though it exceeded parallel provisions of federal law, and the decree does not exceed local law any more than it exceeds federal law.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

COUNTERSTATEMENT OF THE CASE 1

A. DISTRICT OF COLUMBIA CHILD WELFARE SYSTEM 2

B. TRIAL COURT PROCEEDINGS 5

C. POST-TRIAL LITIGATION HISTORY 8

D. CONSENT DECREE COMPLIANCE ISSUES .. 10

REASONS FOR DENYING THE WRIT 12

I. PETITIONERS HAVE SET FORTH NO BASIS FOR A GRANT OF *CERTIORARI* ON THE ISSUE OF PENDENT JURISDICTION. 12

A. THE DECISION BELOW IS CONSISTENT WITH SETTLED PRINCIPLES GOVERNING PENDENT JURISDICTION. 12

B. THE EXERCISE OF PENDENT JURISDICTION DOES NOT VIOLATE PRINCIPLES OF COMITY. 15

TABLE OF CONTENTS - Continued

Page

C. NO CONFLICT AMONG THE CIRCUITS EXISTS. 18

D. PETITIONERS' COMPLAINTS ABOUT LOCAL-LAW RULINGS DO NOT SUPPORT THEIR PETITION. 19

II. THE CONSENT DECREE IS FOUNDED ON SUBSTANTIAL FEDERAL CONSTITUTIONAL AND STATUTORY CLAIMS. 22

III. THE SIGNIFICANCE OF THIS CASE IS FURTHER DIMINISHED BECAUSE THE ISSUE OF PENDENT JURISDICTION IS NOW GOVERNED BY STATUTE. 26

IV. THE DISTRICT IS BOUND BY ITS AGREEMENT TO THE CONSENT DECREE. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CONSTITUTIONS:

U.S. Const. amend. V 1,4

U.S. Const. amend XIV 18

U.S. Const. art. I, § 8 16

CASES:

Alexander v. *Britt*, 89 F.3d 194 (4th Cir. 1996) 18

Angela R. ex rel. Hesselbein v. *Clinton*,
999 F.2d 320 (8th Cir. 1993) 14,18

Ankenbrandt v. *Richards*, 504 U.S. 689 (1992) 17

Baltimore S.S. Co. v. *Phillips*, 274 U.S. 316 (1927) 12

Bergstrom v. *Bergstrom*, 623 F.2d 517 (8th Cir. 1980) .. 19

Blessing v. *Freestone*, No. 95-1441, 65 U.S.L.W. 4265
(U.S. Apr. 21, 1997) 24

Borough of West Mifflin v. *Lancaster*,
45 F.3d 780 (3d Cir. 1995) 27

Brazinski v. *Amoco Petroleum Additives Co.*,
6 F.3d 1176 (7th Cir. 1993) 27

Campbell v. *District of Columbia*,
568 A.2d 1076 (D.C. 1990) 20

TABLE OF AUTHORITIES - Continued

DeShaney v. *Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989) 23

Doe ex rel. Fein v. *District of Columbia*, 93 F.3d 861 (D.C. Cir. 1996) 25

Evans v. *City of Chicago*, 10 F.3d 474 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1831 (1994) 18

Executive Software North America, Inc. v. *U.S. District Court*, 24 F.3d 1545 (9th Cir. 1994) 27

Hagans v. *Lavine*, 415 U.S. 528 (1974) 12,13

Hess v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994) 16

Hessey v. *Burden*, 615 A.2d 562 (D.C. 1992) 21

Huynh Thi Anh v. *Levi*, 586 F.2d 625 (6th Cir. 1978) ... 19

Jeanine B. ex rel. Blondis v. *Thompson*, 877 F. Supp. 1268 (E.D. Wis. 1995) 25

Joseph A. ex rel. Wolfe v. *New Mexico Dep't of Human Services*, 575 F. Supp. 346 (D.N.M. 1983) 20

Kelly v. *LaShawn A. ex rel. Moore*, 510 U.S. 1044 (1994) 9

Kelly v. *Parents United*, 641 A.2d 159 (D.C. 1994) 21

TABLE OF AUTHORITIES - Continued

LaShawn A. ex rel. Moore v. *Kelly*, 887 F. Supp. 297 (D.D.C. 1995) ..... *passim*

Lindler v. *District of Columbia*, 502 F.2d 495 (D.C. Cir. 1974) 21

Marisol A. ex rel. Forbes v. *Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996) 20,25

McLaurin v. *Prater*, 30 F.3d 982 (8th Cir. 1994) 27

Milliken v. *Bradley*, 433 U.S. 267 (1977) 17

Missouri v. *Jenkins*, 495 U.S. 33 (1990) 17

Monaco v. *Mississippi*, 292 U.S. 313 (1934) 15

Moore v. *Sims*, 442 U.S. 415 (1979) 17

Palmer v. *Hospital Auth.*, 22 F.3d 1559 (11th Cir. 1994) 27

Pennhurst State School & Hospital v. *Halderman*, 465 U.S. 89 (1984) 15,16

Rogers v. *Lodge*, 458 U.S. 613 (1982) 15

Rosado v. *Wyman*, 397 U.S. 397 (1970) 13

Rufo v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) 17,29

TABLE OF AUTHORITIES - Continued

Saahir v. *Estelle*, 47 F.3d 758 (5th Cir. 1995) 19

Schmidt v. *Oakland Unified School District*, 457 U.S. 594 (1982) 13

Siler v. *Louisville & Nashville R.R.*, 213 U.S. 175 (1909) 13

Suter v. *Artist M.*, 503 U.S. 347 (1992) ..... *passim*

Sweeton v. *Brown*, 27 F.3d 1162 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1118 (1995) 18

Timmy S. v. *Stumbo*, 537 F. Supp. 39 (E.D. Ky. 1981) ... 20

Tony L. v. *Childers*, 71 F.3d 1182 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1834 (1996) 25

Turner v. *District of Columbia*, 532 A.2d 662 (D.C. Cir. 1987) 21

United Mine Workers v. *Gibbs*, 383 U.S. 715 (1966) ..... *passim*

White ex rel. White v. *Chambliss*, 1997 U.S. App. LEXIS 9288 (4th Cir. Apr. 30, 1997) 24,25

Wilder v. *Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988) 20

Wilder v. *Virginia Hospital Ass'n*, 496 U.S. 498 (1990) 24

TABLE OF AUTHORITIES - Continued

Will v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989) 15

Women Prisoners of the D.C. Dep't of Corrections v. *District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996), *cert. denied*, 65 U.S.L.W. 3727 (U.S. Apr. 29, 1997) 21

Yee v. *City of Escondido*, 503 U.S. 519 (1992) 17

Youngberg v. *Romeo*, 457 U.S. 307 (1982) 23

Younger v. *Harris*, 401 U.S. 37 (1971) 8,19,20

STATUTES:

Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (June 17, 1980) (codified as amended at 42 U.S.C. §§ 620-28 and §§ 670-76) 3,20

42 U.S.C. § 622 25
42 U.S.C. § 622(b)(9)(B)(ii) 3,24,25
42 U.S.C. § 622(b)(9)(B)(iii)(I) 4
42 U.S.C. § 622(b)(9)(B)(iii)(II) 4
42 U.S.C. § 671(a)(10) 4,25
42 U.S.C. § 671(a)(15) 23,25
42 U.S.C. § 671(a)(16) 4,24,25
42 U.S.C. § 675(1)(B) 4
42 U.S.C. § 675(5) 3
42 U.S.C. § 675(5)(B) 24
42 U.S.C. § 675(5)(C) 25

TABLE OF AUTHORITIES - Continued

Child Abuse Prevention and Treatment Act,
Pub. L. No. 93-247, 88 Stat. 4 (Jan. 31, 1974)
(codified as amended at 42 U.S.C. §§ 5101-06) 3

42 U.S.C. § 5106a(b)(2) 3,5,25

District of Columbia Financial Responsibility and
Management Act of 1995, Pub. L. No. 104-8,
109 Stat. 97 (1996) 16

District of Columbia Self-Government and
Governmental Reorganization Act, Pub. L. No. 93-198,
87 Stat. 774 (1973) 16

§ 433(a), 87 Stat. 795 16
§ 445, 87 Stat. 800-12 16
§ 602(a)(4), 87 Stat. 813 16

28 U.S.C. § 1367 26,27
28 U.S.C. § 1367(a) & (c) 28
42 U.S.C. § 1320a-2 24
42 U.S.C. § 1320a-10 24
42 U.S.C. § 1983 24,25

Prevention of Child Abuse and Neglect Act of 1977,
D.C. Law 2-22 (Sept. 23, 1977) (codified as amended at
D.C. Code Ann. §§ 2-1351-57, §§ 6-2101-07,
§§ 6-2121-27 and §§ 16-2351-65) 3

D.C. Code Ann. § 6-2102(b) 3,5
D.C. Code Ann. § 6-2107(b) 3,4
D.C. Code Ann. § 6-2122(c) 4

TABLE OF AUTHORITIES - Continued

D.C. Code Ann. § 6-2122(d) 4
D.C. Code Ann. § 6-2123(b)(1)-(3) 4
D.C. Code Ann. § 16-2323(b) 4

Youth Residential Facilities Licensure Act of 1986, D.C. Law 6-139 (Aug. 13, 1986) (codified as amended at D.C. Code Ann. §§ 3-801-08) 3,20

D.C. Code Ann. § 3-802 4
D.C. Code Ann. § 3-803 4
D.C. Code Ann. § 3-805 4

RULES AND REGULATIONS:

Sup. Ct. R. 14.1.(a) 17

MISCELLANEOUS:

16 Robert C. Casad *et al.*, Moore's Federal Practice § 106.61 (3d ed. 1997) 27

13B Charles Alan Wright *et al.*, Federal Practice and Procedure § 3567.1 (Supp. 1996) 27

TABLE OF AUTHORITIES - Continued

PUBLISHED DECISIONS IN *LaSHAWN A.*:

LaShawn A. v. *Dixon*, 762 F. Supp. 959 (D.D.C. 1991), *aff'd on other grounds sum nom. LaShawn A. ex rel. Moore* v. *Kelly*, 990 F.2d 1319 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994), *subsequent appeal*, *LaShawn A.* v. *Barry*, 69 F.3d 556 (D.C. Cir. 1995), *vacated en banc*, 74 F.3d 303 (D.C. Cir. 1996), *on rehearing en banc*, 87 F.3d 1389 (D.C. Cir. 1996).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARION S. BARRY, JR., *et al.*,

Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

In this class action by children in the District of Columbia's foster care system and children known to the District to be in danger of abuse or neglect, the federal district court ruled that petitioners had committed sweeping violations of federal law, District law, and the Due Process Clause of the Fifth Amendment in their operation of the District's child welfare system. Petitioners then negotiated and agreed to a broad consent order, while preserving their right to appeal the court's liability rulings. Petitioners did not object to -- rather, they affirmatively agreed to -- the scope of the remedial order, provided their liability was upheld on appeal.

The court of appeals declined to pass on the district court's federal statutory and constitutional rulings, but affirmed petitioners' liability under D.C. law. It remanded to the district

court for its consideration whether any provisions in its remedial order were sustainable only under federal law. Petitioners sought review here, urging that the court of appeals should not have exercised pendent jurisdiction over the D.C. law issues. This Court denied *certiorari*.

The district court ruled on remand that its remedial order could be sustained under local as well as federal law. Petitioners on appeal argued that the remedy should be set aside because it exceeds the requirements of D.C. law. The court of appeals rejected that argument, ruling that petitioners had consented to the scope of the remedial order subject only to their appeal on the underlying federal law liability issues, and, their liability having been upheld under the almost identical provisions of local law, their objection to the scope of the remedial decree had essentially been waived.

Petitioners have now returned, repeating the arguments they made in their first petition to this Court that the courts below should have declined to exercise pendant jurisdiction over the D.C. law claims. But nothing has happened since the Court first denied review to warrant *certiorari* now. Nor does petitioners' objection to the scope of the remedy deserve review. Settled precedents of this Court allow governments to agree to do more than the minimum necessary to remedy violations of law, and in any event the court of appeals correctly ruled that, because petitioners had negotiated and agreed to a remedy exceeding the requirements of federal law, they could not object to the same remedy on the ground that it exceeded the parallel requirements of local law.

A. DISTRICT OF COLUMBIA CHILD WELFARE SYSTEM

The D.C. child welfare system, funded by both local and federal revenues, is designed to provide both short-term care

and long-term planning for the care of children whose parents are unable to provide for them. The children who receive or are in need of care under this system have a panoply of legal rights under D.C. and federal statutes and under the United States Constitution. Relevant statutes include the Child Abuse Prevention and Treatment Act,[1] the Prevention of Child Abuse and Neglect Act of 1977,[2] the Adoption Assistance and Child Welfare Act of 1980,[3] and the Youth Residential Facilities Licensure Act of 1986.[4] As the D.C. Circuit noted, the applicable local and federal statutes impose overlapping obligations that "parallel [one another] almost precisely." Petitioners' Appendix (hereinafter "Pet. App.") at 92a. Under these mandates, the District of Columbia is required, for instance, to:

-- promptly investigate reports of suspected child abuse and neglect, and take steps to protect children once reports are made, 42 U.S.C. § 5106a(b)(2); D.C. Code Ann. § 6-2102(b);

-- assure that all children who enter foster care receive written "case plans," 42 U.S.C. §§ 622(b)(9)(B)(ii), 671(a)(16), 675(5); D.C. Code Ann. §§ 6-2107(b),

---

[1]Pub. L. No. 93-247, 88 Stat. 4 (Jan. 31, 1974) (codified as amended at 42 U.S.C. §§ 5101-06).

[2]D.C. Law 2-22 (Sept. 23, 1977) (codified as amended at D.C. Code Ann. §§ 2-1351-57, §§ 6-2101-07, §§ 6-2121-27 and §§ 16-2351-65).

[3]Pub. L. No. 96-272, 94 Stat. 500 (June 17, 1980) (codified as amended at 42 U.S.C. §§ 620-28 and §§ 670-76).

[4]D.C. Law 6-139 (Aug. 13, 1986) (codified as amended at D.C. Code Ann. §§ 3-801-08).

16-2323(b). The purpose of these plans is to articulate specific goals for the handling of each child's case, and to ensure that children are appropriately placed and cared for and that they remain in foster care no longer than necessary. Pet. App. at 29a;

-- provide children with safe foster care placements and services to assure that they are not harmed while in foster care, 42 U.S.C. § 671(a)(10); D.C. Code Ann. §§ 3-802, 3-803, 3-805; U.S. Const. amend. V;

-- provide services to families to enable children to return home, when appropriate, 42 U.S.C. § 622(b)(9)(B)(iii)(I); D.C. Code Ann. §§ 6-2123(b)(1) & (3), 6-2107(b);

-- enable those children who cannot return home to be adopted or placed in alternative permanent placements outside of government custody, 42 U.S.C. §§ 622(b)(9)(B)(iii)(II), 675(1)(B); D.C. Code Ann. §§ 6-2123(b)(2); and

-- employ and procure sufficient personnel and resources to comply with the mandates of D.C. law, D.C. Code Ann. § 6-2122(c); and maintain staff qualifications, worker caseloads, and supervision requirements consistent with professional standards, *id.* § 5-2122(d).

Petitioners attempt to distract this Court by suggesting that this case involves custody matters routinely handled by the Family Division of the D.C. Superior Court. This is not a child custody case, however, and it does not involve the district court in making determinations regarding parental rights or the placement of children in foster case or into adoption proceedings. Rather, this case involves the claims of a class of several thousand children that the D.C. government, systematically and over a period of years, failed to carry out the

duties imposed by the laws governing the child welfare system as a whole.

B. TRIAL COURT PROCEEDINGS

In 1989, respondent children brought suit in federal court seeking injunctive relief only. During a two-week trial before the Honorable Thomas F. Hogan in 1991, the D.C. government offered virtually no evidence to contest the overwhelming case that the child welfare system was violating local and federal law. Instead, respondents' allegations were confirmed by over one thousand admissions by petitioners, as well as uncontroverted expert testimony about class-wide violations of respondents' rights and about the devastating consequences of those violations to the children. Judge Hogan thus held that the child welfare system "does not comply with federal law, *District law*, or, for those plaintiffs in the District's foster care, the United States Constitution." Pet. App. at 5a (emphasis added).

The district court's ruling was inevitable, given the wholesale failure of the District to comply with the most rudimentary legal requirements. For instance, Judge Hogan found that:

-- For years, the Department had failed to initiate and complete investigations of neglect in a timely manner, as required by 42 U.S.C. § 5106a(b)(2) and D.C. Code Ann. § 6-2102(b), piling up a backlog of thousands of cases of children known to be in potentially dangerous situations. Pet. App. at 21a-24a;

-- Nearly 75% of children in the District's voluntary-care custody had been there more than the 90-day limit imposed by District law and some members of the class had remained there for as long as two years. Pet. App. at 26a;

-- The District failed to provide basic social and medical care services to hundreds of children in foster care;[5]

-- Children in foster care were often given totally inappropriate case planning goals in light of their age. For instance, numerous children were assigned the permanency goal of independent living before they reached age 4. Numerous other children were relegated to the category of permanent foster care before they reached the age of five. Pet. App. at 30a;

-- Of the children for whom the District had determined that adoption was appropriate, over 71% continued to languish in foster care because they had not been referred to the agency's adoption unit in a timely manner. Pet. App. at 35a;

-- The D.C. government failed to staff the agency at levels necessary to make the system work. Dozens of social worker positions that were authorized were left unfilled, leaving those on staff with dangerously high caseloads.[6]

---

[5]In the cases of more than one-half of the children in the District's foster-care custody, there was no evidence that they had ever been visited by their social worker, and 149 class members in the District's custody had no social worker at all. Pet. App. at 33a. Since having entered the District's custody, 44% of the children had never had a medical examination, and 79% had not had a dental examination. *Id.*

[6]At the time of trial, 107 of 239 authorized social worker positions within the District's child-welfare agency were vacant. As a result, one worker testified that she was struggling with a caseload of 251 children, making it "impossible for her to visit each child regularly." Pet. App. at 41a.

Judge Hogan found that these widespread systemic failures have had terrible consequences for the children. For instance, named plaintiff LaShawn A. was placed in "emergency care" by her mother when she was thirty months old. Though District law directs that emergency care last no longer than ninety days, LaShawn languished there for two and one-half years, during which time the District never developed a case plan for her and her case was never reviewed, in violation of federal and District of Columbia law. She was placed in a foster home in which she may have been sexually and physically abused, and was diagnosed with severe psychiatric problems by the time she reached age 6. Pet. App. at 51a-52a.

Named plaintiff Kevin E. experienced a similarly disturbing odyssey through the foster-care system. Kevin entered foster care as an infant and was still in government custody at the time of trial -- eleven years later. More than once he was inappropriately returned to his mother, who was an unfit parent. Though the District had concluded soon after he had entered foster care that Kevin should be adopted, District officials never followed mandated procedures to make him available for adoption, thus relegating him to long-term government custody. At the age of eight Kevin told hospital staff that he hated himself, and he placed himself in a trash can and asked to be thrown away. See Pet. App. at 28a, 55a-56a.

On the basis of these and other findings, the district court entered judgment against petitioners. Instead of imposing injunctive relief of his own making, Judge Hogan entered a remedial order negotiated by the parties without the court's involvement. The order preserved the District's right to appeal the liability rulings, providing that the District would be free of its obligations under the consent order if the liability judgment was "vacated on appeal in its entirety." If the judgment was vacated in part, the remedial order would be likewise modified. Petitioners' Lodging Accompanying Petition, tab A § XXII(c).

C. POST-TRIAL LITIGATION HISTORY

1. *LaShawn I*. In the first appeal, the District made only three arguments: that Judge Hogan should have abstained pursuant to *Younger* v. *Harris*, 401 U.S. 37 (1971), that its actions did not violate the Constitution, and that there was no private right of action under the applicable federal statutes. The District did not dispute Judge Hogan's findings of widespread violations of D.C. and federal statutes.

Respondents defended the federal liability rulings, and also argued that the undisputed violations of D.C. law provided an independent basis for upholding the consent decree. In reply, the District did not dispute that liability could be sustained on the basis of D.C. law, but merely pointed out, inaccurately, that the district court had not rested its liability ruling on the D.C. law violations. Nor did petitioners argue that the exercise of pendent jurisdiction over the D.C. law claims would be inappropriate in light of *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). Instead, they offered the unsupported, unexplained assertion that such "matters * * * plainly belong not in a federal court but in the courts of the District of Columbia." Reply Brief (Sept. 8, 1992) at 7-8.

Having practically been invited by the District to affirm on the basis of D.C. law, a panel of the D.C. Circuit did just that. After rejecting the *Younger* abstention argument, the panel determined that it was not necessary to reach the constitutional and federal statutory questions because liability under D.C. law was clear. The panel (Mikva, C.J., Sentelle and Randolph, J.J.) held that its "authority to decide the case entirely on pendent state grounds [was] incontrovertible," and the court affirmed Judge Hogan's decision, remanding "with instructions to fashion an equally comprehensive order based entirely on District of Columbia law, if possible." Pet. App. at 96a-97a. The District unsuccessfully sought rehearing and rehearing

en banc, challenging for the first time the existence of a cause of action under D.C. law. The District then sought *certiorari* and for the first time argued that the exercise of pendent jurisdiction over the D.C. law claims was improper. That petition was denied. *Kelly* v. *LaShawn A. ex rel. Moore*, 510 U.S. 1044 (1994).

2. Remand To The District Court. On remand, the district court re-examined the consent decree as directed by the court of appeals to determine whether any provisions rested solely on federal law. The court found there were none, and re-entered the agreed-upon remedial order with only slight modifications.

3. *LaShawn II* -- The Panel Decision. On appeal from Judge Hogan's reaffirmation of the consent decree, a divided panel of the D.C. Circuit, over a vigorous dissent by Judge Randolph, remanded the case for a re-examination of the pendent jurisdiction issue in view of *Suter* v. *Artist M.*, 503 U.S. 347 (1992). See Pet. App. 105a. The panel did this even though *Suter* was (1) issued prior to *LaShawn I*; (2) addressed extensively in both parties' *LaShawn I* briefs; (3) discussed at the *LaShawn I* argument; and (4) explicitly referred to in the *LaShawn I* decision. In dissent, Judge Randolph stated that re-examining pendent jurisdiction violated the law-of-the-case doctrine. Judge Randolph also concluded that the *LaShawn I* panel's power to affirm on the basis of the D.C. claims was clear; that as a matter of discretion, the exercise of that power was appropriate; and that comity did not preclude the exercise of jurisdiction over D.C. law claims brought against the District. See Pet. App. 134a-49a.

4. *LaShawn II* -- En Banc Review. On rehearing *en banc*, the D.C. Circuit, by a 9-2 vote, reversed the panel decision on the ground that reopening the pendent jurisdiction ruling violated the law-of-the-case and law-of-the-circuit doctrines. The *en banc* court remitted the case to the panel for

consideration of the issues the District had raised in its second appeal. Pet. App. at 170a.

5. *LaShawn II* -- Final Disposition. After hearing the third oral argument of the second appeal, the panel affirmed Judge Hogan's order on remand in an unpublished order, rejecting the District's argument that the consent decree should be vacated because it exceeded the requirements of District law. The panel held that, because the District had earlier consented "to substantially the same decree," and the consent decree did "not extend beyond District law more than it extends beyond federal law, * * * the substitution of District law alone as the basis of the decree * * * did not materially undermine the District's consent." Pet. App. at 2a. The District again unsuccessfully sought rehearing and rehearing *en banc*.

D. CONSENT DECREE COMPLIANCE ISSUES

Throughout the appellate process, the District has been obligated to comply with the consent decree. As later rulings by Judge Hogan make clear, however, the District's record of compliance is barely distinguishable from its pre-litigation failure to follow federal and D.C. law. According to Judge Hogan, the petitioners' post-judgment actions were "marked by repeated cycles of noncompliance, * * * sluggish progress, frustration, * * * and further noncompliance * * *." See *LaShawn A.* v. *Kelly*, 887 F. Supp. 297, 299 (D.D.C. 1995). As a result, three years after entry of the consent decree, Judge Hogan appointed three limited receivers with circumscribed authority to implement changes in specific areas in which the District's non-compliance was particularly egregious and damaging to the class members. *Id.* at 300. Their efforts at change were met with "resistance and hostility." *Id.*

In May of 1995, nearly four years after entry of the agreed-upon remedial order, the district court determined that the

petitioners were "radically out of compliance with the Court's orders," *id.* at 313, including many of those provisions of the consent decree "voluntarily proposed by [petitioners]." *Id.* at 300. Adoption activity had "nearly ground to a halt," *id.*, and the critical shortage of social workers had not been corrected. *Id.* at 302. The District also continued to fail to provide basic administrative support to workers, *id.*, and had failed to take the steps necessary to maximize the receipt of available federal funds. Petitioners were also letting other available services go to waste. *Id.* at 308-09, 313.

The effects of this lack of compliance, the district court found, were tragic. One child was beaten and strangled to death despite the District's prior receipt of a report of neglect; the court-appointed monitor who reviewed the case said the child's death was "prevent[able]." *Id.* at 311. The district court also found that due to a severe shortage of foster care placements (despite many unprocessed applications from potential foster families), children were being shuttled from one emergency placement to another, depriving them of the continuity and security necessary for normal development. *Id.* at 312.

Based on these and other findings, the district court held the District in civil contempt, and ordered the imposition of a general receivership. The court explained that although it was "reluctan[t] to impose contempt sanctions and to interfere in the operations of local government by imposing broad receiverships or issuing flurries of micromanaging orders," *id.* at 317 (footnote omitted), the respondent children "face[d] great danger in the present system," and the District's "pattern of delay and inaction" had to come to an end. *Id.* The court ordered that the District and the plaintiffs, with the aid of a court-appointed monitor, work out the terms of implementation of the receivership. *Id.* at 316. The District has appealed this and a series of other orders regarding various aspects of the

limited and general receiverships to the D.C. Circuit, where these matters are pending.

REASONS FOR DENYING THE WRIT

I. PETITIONERS HAVE SET FORTH NO BASIS FOR A GRANT OF *CERTIORARI* ON THE ISSUE OF PENDENT JURISDICTION.

A. THE DECISION BELOW IS CONSISTENT WITH SETTLED PRINCIPLES GOVERNING PENDENT JURISDICTION.

It is well settled that pendent jurisdiction allows federal courts to adjudicate claims based on state or local law. This principle derives from this Court's decisions requiring a plaintiff "'to try his whole cause of action and his whole case at one time,'" thereby advancing judicial economy and avoiding piecemeal litigation. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 723 (1966), *quoting Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 320 (1927). *Gibbs* sets forth a two-part test for determining whether pendent jurisdiction exists and whether its exercise is appropriate. First, a federal court has the power to hear pendent claims when a substantial federal claim and a local law claim "derive from a common nucleus of operative fact." *Id.* at 725. A federal claim is "substantial" so long as it is not "'obviously frivolous'" or "'no longer open to discussion.'" *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974) (citations omitted). Previous court decisions that make claims "'doubtful or questionable'" do not render them insubstantial for purposes of determining federal jurisdiction. *Id.* at 537-38 (citation omitted). As *Gibbs* explains, "[t]he question of power [to decide the state claims] will ordinarily be resolved on the pleadings." 383 U.S. at 727.

Under the second part of the *Gibbs* test, a federal court must determine whether to exercise pendent jurisdiction as a matter of judicial discretion, taking into consideration a number of factors relating to "judicial economy, convenience and fairness to litigants." *Id.* at 726. Thus, a federal court may decline to hear pendent claims when the federal claims are dismissed before trial, or when the state claims "substantially predominate." *Id.* at 726-27. On the other hand, the exercise of pendent jurisdiction is particularly appropriate when "substantial time and energy have been expended looking toward the resolution of a dispute that plaintiffs were entitled to bring in a federal court." *Rosado* v. *Wyman*, 397 U.S. 397, 404 (1970) (affirming entry of judgment on state claims even though federal claims dropped out upon entry of judgment notwithstanding the verdict for lack of adequate proof). In addition, pendent jurisdiction should be exercised to avoid a ruling on constitutional issues. *Schmidt* v. *Oakland Unified School Dist.*, 457 U.S. 594, 594-95 (1982) (court abused its discretion by deciding constitutional issue when case could have been disposed of on state law grounds, even if state law issue was "a sensitive matter"); see also *Hagans*, 415 U.S. at 546-47 ("The doctrine is * * * recurringly applied, and, at the very least, it presumes the advisability of deciding first the pendent, nonconstitutional issue.") (citation and footnote omitted); *Siler* v. *Louisville & Nashville R.R.*, 213 U.S. 175, 192-93 (1909).

Under these precepts, the *LaShawn I* panel appropriately affirmed Judge Hogan's liability ruling on the basis of D.C. law. The D.C. Circuit plainly had the power to consider the local law issues: the federal and D.C. claims derived from a common nucleus of operative fact and the federal statutory and constitutional claims were far more than "substantial" at the outset since plaintiffs prevailed on all of them after full trial; petitioners do not contend otherwise. Notwithstanding this Court's decision in *Suter* v. *Artist M.*, 503 U.S. 347 (1992), the

overwhelming majority of plaintiffs' federal statutory claims remain viable, and *Suter* has no relevance at all to respondents' winning constitutional claims. See *infra* pp. 23- 26.[7] None of the multiple federal adjudications in this case has been reversed to this day.

The D.C. Circuit's decision to affirm on the basis of the D.C. law claims also finds strong support in this Court's teachings. First, affirming liability on the basis of local law allowed the D.C. Circuit to avoid resolving "complex constitutional and federal statutory issues in this case." Pet. App. at 92a. Second, the D.C. Circuit's ruling came only after the parties had expended substantial time and energy in resolving their dispute. The district court had shepherded the case through full discovery, a two-week trial, and the negotiation by the parties and subsequent approval by the court of a detailed consent decree. By the time *LaShawn I* was decided, the case had been pending for nearly four years. Finally, during the briefing of *LaShawn I*, petitioners never argued that they had not violated D.C. law or that *Gibbs* precludes the exercise of pendent jurisdiction; nor did petitioners challenge respondents' reading of local law until after the case was decided by the appellate court, at which point they had waived their right to contest liability under D.C. law. These factors plainly demonstrate that *LaShawn I* was correctly decided.

---

[7]In fact, one of the cases cited by petitioners holds that even after *Suter*, federal claims parallel to those raised by respondents were still considered substantial enough to support entry of a consent decree. See *Angela R. ex rel. Hesselbein* v. *Clinton*, 999 F.2d 320, 324 (8th Cir. 1993) ("Because [*Suter*] does not 'inescapably render the [federal statutory] claims frivolous,' we think it clear that the district court had jurisdiction to approve the proposed settlement and to enter a consent decree * * * .") (citation omitted).

B. THE EXERCISE OF PENDENT JURISDICTION DOES NOT VIOLATE PRINCIPLES OF COMITY.

Ignoring the myriad factors supporting the D.C. Circuit's exercise of pendent jurisdiction, petitioners argue that out of deference to petitioners' status as local government officials, a federal court should not enter or enforce a consent decree unless the decree is explicitly based upon federal law.

By failing to present this argument to the D.C. Circuit in a timely manner, petitioners waived their right to do so in this Court. Petitioners never argued to the *LaShawn I* panel that under *Gibbs*, considerations of comity preclude the exercise of pendent jurisdiction over local law claims against a municipality. By the time petitioners raised the argument in *LaShawn II*, it was too late, as the *en banc* court held that the pendent jurisdiction issue should not be revisited. Arguments not properly raised and addressed in the lower courts provide no basis for *certiorari*. *Rogers* v. *Lodge*, 458 U.S. 613, 628 n.10 (1982).

In any event, petitioners' appeal to comity as a trump card is without basis in law. It is true that this Court held in *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984) ("*Pennhurst II*"), that a federal court may not hear pendent claims for injunctive relief against states based on state law. But that holding was grounded in the Eleventh Amendment, and in the notion that "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention.'" *Monaco* v. *Mississippi*, 292 U.S. 313, 322-23 (1934) (citation omitted). As this Court has often repeated, however, "States are protected by the Eleventh Amendment while municipalities are not." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989).

Petitioners' attempt to extend *Pennhurst II* to municipalities is particularly inappropriate here, given that the District of Columbia is not a creation of state government, but rather is a wholly federal entity. U.S. Const. art I, § 8. Thus, federal court action with regard to the District presents none of the federalism concerns that lie at the heart of *Pennhurst II*. Indeed, while Congress has granted the District limited home rule, see District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973),[8] the District's own judicial system has remained an essentially federal operation. See *id.* at § 602(a)(4) (District government may not amend portions of D.C. code dealing with the organization and jurisdiction of D.C. courts); § 445 (District government has no control over budget of D.C. courts); § 433(a) (D.C. judges appointed by the President with the advice and consent of the Senate).

Accordingly, as Judge Randolph recognized in his dissent from the initial panel decision in *LaShawn II*, comity towards municipalities -- however important that concern might be ordinarily -- should not preclude the exercise of pendent jurisdiction over local law claims against a "distinctly federal entity." Pet. App. at 148a ("A suit in federal court against a federal entity 'is hardly the instrument of a distant, disconnected sovereign,' and thus raises none of the concerns that underpin the Eleventh Amendment or the Supreme Court's application of it in *Pennhurst II*.") *Id.* (*quoting Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 41 (1994)).

None of the cases cited by petitioners (Petition at 19-21) (hereinafter "Pet.") suggests that the exercise of pendent

---

[8]But see District of Columbia Financial Responsibility and Management Act of 1995, Pub. L. No. 104-8, 109 Stat. 97 (1996) (temporarily revoking certain home rule authority).

jurisdiction was inappropriate here. In fact, to the extent these cases are relevant, the district court has properly followed this Court's guidance. *Milliken* v. *Bradley*, 433 U.S. 267, 280-81 (1977), cautioned that a federal court remedy must "take into account the interests of state and local authorities in managing their own affairs." *Missouri* v. *Jenkins*, 495 U.S. 33, 52 (1990), similarly counseled that district courts should, in enforcing consent decrees against state and local authorities, allow them the greatest "opportunity to devise their own solutions" to institutional violations. See also *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 392 (1992) (same).[9] Judge Hogan unquestionably followed these precepts. Rather than dictate the terms of an injunction, he invited the parties to negotiate a remedy, and entered their agreed decree which provided for the District's continued management of the child welfare system. Judge Hogan resisted requests for the appointment of a receiver for nearly four years, until it became painfully clear that the District was making no progress towards compliance.

---

[9]Petitioners' reliance on this Court's rulings in cases involving issues of child custody is similarly misplaced. *Ankenbrandt* v. *Richards*, 504 U.S. 689, 704 (1992), recognized an exception to federal diversity jurisdiction encompassing "only cases involving the issuance of a divorce, alimony, or child-custody decree." *Moore* v. *Sims*, 442 U.S. 415, 425 (1979), held that abstention is appropriate where a party to a pending child custody proceeding in state court seeks to collaterally attack the constitutionality of a state statute in federal court. Nothing remotely similar is present herein. Moreover, citation of *Moore* v. *Sims* is not adequate to raise the issue of abstention in the current petition, which does not properly present the issue for review. See *Yee* v. *City of Escondido*, 503 U.S. 519, 535-36 (1992); Sup. Ct. R. 14.1.(a).

C. NO CONFLICT AMONG THE CIRCUITS EXISTS.

Contrary to petitioners' suggestion, the D.C. Circuit's decision does not conflict with the federal court of appeals cases cited by petitioners, none of which even discusses the exercise of pendent jurisdiction. Three of the cases petitioners cite discuss modification of a consent decree when there is a change in the law that formed the basis for the decree. See *Evans* v. *City of Chicago*, 10 F.3d 474, 480 (7th Cir. 1993) (*en banc*), *cert. denied*, 114 S. Ct. 1831 (1994)[10]; *Sweeton* v. *Brown*, 27 F.3d 1162, 1165 (6th Cir. 1994) (*en banc*), *cert. denied*, 115 S. Ct. 1118 (1995); *Alexander* v. *Britt*, 89 F.3d 194, 200 (4th Cir. 1996). In *Angela R. ex rel. Hesselbein* v. *Clinton*, 999 F.2d 320 (8th Cir. 1993),[11] the court considered whether the enforcement provisions of a consent decree against state

---

[10]The plurality in *Evans* stated in *dicta* that "principles of respect for a coordinate sovereign (and in some cases the eleventh amendment) mean that federal courts should refrain from adjudicating claims under state law, whether raised directly or whether used as the springboards for other theories." 10 F.3d at 481. The plurality was not declaring an end to pendent jurisdiction over claims against municipalities based on local law; rather, the opinion merely rejected the plaintiffs' 14th Amendment due process claim based on a violation of state law.

[11]The court in *Angela R.* stated in *dicta* that "expending significant federal judicial resources enforcing consent decree provisions that concern only issues of state law is rarely justifiable." *Angela R.*, 999 F.2d at 326. The court was referring not to state law issues under which the case arose, however, but consent decree provisions that had subsequently been enacted into law. In the instant case, the federal court found rampant violations of parallel federal and local statutory provisions; these findings were never reversed or vacated; the District never contested the violations; and the provisions of the consent decree all are required by, or designed to remedy the violation of, the law under which the claims arose.

officials were sufficiently specific to support approval of the decree. Another court of appeals case petitioners cite dealt with the enforceability of a provision included in a settlement agreement that was agreed to by the state, but was not related to remedying the violation of the law under which the case arose. *Saahir* v. *Estelle*, 47 F.3d 758, 761 (5th Cir. 1995).[12]

D. PETITIONERS' COMPLAINTS ABOUT LOCAL-LAW RULINGS DO NOT SUPPORT THEIR PETITION.

In a futile attempt to buttress their argument that the exercise of pendent jurisdiction was inappropriate, petitioners suggest that the federal courts have impinged on the jurisdiction of the local courts and have misinterpreted District law. Pet. at 27-29. These claims do not warrant a grant of *certiorari*; in fact, they are meritless.

1. The consent decree in no way interferes with the exclusive jurisdiction of neglect and adoption proceedings vested in the D.C. Superior Court. This class action is not a neglect or custody case. Rather, the consent decree aims at systemic reform of the District's woefully inadequate child-welfare system. The *LaShawn I* panel said just that, when it decided that *Younger* abstention was not required because proceedings in the Family Division are not an appropriate forum for resolving the respondent children's claims. Pet. App. at 87a-

---

[12]Cases cited by petitioners involving federal court abstention or failure to exhaust state remedies when state court custody proceedings are pending or available, *Bergstrom* v. *Bergstrom*, 623 F.2d 517 (8th Cir. 1980); *Huynh Thi Anh* v. *Levi*, 586 F.2d 625 (6th cir. 1978), likewise are not in conflict with the decision below, because the Family Division of the D.C. Superior Court is not the appropriate forum for resolving the claims presented in this case, as the D.C. Circuit found. Pet. App. at 87a-92a.

92a.[13] Petitioners apparently have accepted this point because they do not seek *certiorari* on the *Younger* issue.

2. The federal courts have not misinterpreted the Youth Residential Facilities Licensure Act of 1986 (the "Act"). The appeals court did not rule on the issue of notice because petitioners never raised that issue in the district court or on appeal until they sought rehearing in *LaShawn I*. In any event, the District's reliance on the Act's notice provision is misplaced. As noted in *Campbell* v. *District of Columbia*, 568 A.2d 1076, 1098 (D.C. 1990), the purpose of such a notice provision is to allow the Mayor to investigate and remedy individual claims prior to the filing of a lawsuit to avoid unnecessary litigation. Here, it is inconceivable that the Mayor could have, with *five-days'* notice, remedied the systemic violations of the Act identified by respondents. Indeed, the District was unable, during the first *four years* after the entry of the consent decree, to remedy its numerous violations of the Act. See *LaShawn A.*, 887 F. Supp. at 306-07.

---

[13]Systemic illegalities pervading the entirety of a child welfare system and affecting an entire class of children, such as those Judge Hogan found here on an extensive factual record, cannot be addressed within the narrowly circumscribed parameters of an individual child's abuse or neglect proceeding in the Family Division. For this reason, abstention has been consistently rejected in class action injunctive litigation regarding child welfare systems. See, *e.g.*, *Marisol A. ex rel. Forbes* v. *Giuliani*, 929 F. Supp. 662, 687-89 (S.D.N.Y. 1996); *Wilder* v. *Bernstein*, 645 F. Supp. 1292, 1339 n.37 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988); *Joseph A. ex rel. Wolfe* v. *New Mexico Dep't of Human Services*, 575 F. Supp. 346, 350 (D.N.M. 1983); see also *Timmy S.* v. *Stumbo*, 537 F. Supp. 39, 46 (E.D. Ky. 1981) (rejecting abstention in individual-child case under federal Adoption Assistance Act).

3. The *LaShawn I* panel's reliance on *Turner* v. *District of Columbia*, 532 A.2d 662 (D.C. 1987), to support injunctive relief against the District was not, as petitioners suggest, inappropriate. Pet. at 27-28. Having never timely advised the D.C. Circuit of this view, petitioners have waived this argument. In any event, it is well established that violations of District law by the District government can be remedied by injunctive relief. See, *e.g.*, *Kelly* v. *Parents United*, 641 A.2d 159, 165 (D.C. 1994) (affirming permanent injunction against the District designed to remedy violations of a D.C. statute). See also *Hessey* v. *Burden*, 615 A.2d 562, 571 (D.C. 1992) (citing cases). Thus, the *LaShawn I* panel did not decide a "novel" issue of District law when it concluded that the violations of D.C. law could support the remedial decree.[14]

4. Contrary to the District's assertion, the consent decree is not based on the premise that an unpublished internal agency operating manual constitutes District law. Pet. at 28. Rather, Judge Hogan carefully distinguished between binding D.C. law and the Child and Family Services Division's Manual of Operations (the "Manual"). See Pet. App. at 21a-22a (distinguishing between D.C. law and the Manual which

---

[14]Petitioners' reliance on the D.C. Circuit's ruling in *Women Prisoners of the D.C. Dep't of Corrections* v. *District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996), *cert. denied*, 65 U.S.L.W. 3727 (U.S. Apr. 29,1997), is unavailing. The D.C. Court of Appeals, not the D.C. Circuit, is the final arbiter on matters of D.C. law. See *Lindler* v. *District of Columbia*, 502 F.2d 495, 498 n.4 (D.C. Cir. 1974). And, as noted in the text above, the D.C. Court of Appeals has clearly endorsed equitable remedies for violations of D.C. law by the District government. Moreover, any inconsistency between two decisions in the D.C. Circuit regarding the interpretation of D.C. law can be resolved by the Circuit or by the D.C. Court of Appeals, and does not require the intervention of this Court.

expressed "policy"). Judge Hogan merely noted that one provision of the Manual paralleled a requirement of federal law, and that other subsections provided more specific guidelines regarding the implementation of general requirements of relevant D.C. statutes. See, *e.g.*, Pet. App. at 8a-10a. The court's reference to these provisions in no way suggests that the Court improperly accorded the Manual the status of law.

5. Finally, the District disputes the merits of various orders issued by Judge Hogan under the consent decree.[15] Pet. at 28. But these complaints neither support a jurisdictional challenge to the consent decree, nor provide any reason to grant *certiorari*. Indeed, a grant of *certiorari* to consider any such issue would be premature, since these issues are now the subject of several appeals to the D.C. Circuit.[16]

II. THE CONSENT DECREE IS FOUNDED ON SUBSTANTIAL FEDERAL CONSTITUTIONAL AND STATUTORY CLAIMS.

Certiorari is not appropriate for the additional reason that, notwithstanding the *LaShawn I* panel's decision to affirm liability based on D.C. law, the consent decree is still supported by numerous violations of respondents' federal constitutional

---

[15]The District is particularly indignant about Judge Hogan's appointment of a general receiver. See Pet. at 29. But, as noted above, the district court only reluctantly appointed a general receiver four years after entry of the consent decree, after the more modest step of limited receiverships proved ineffective, due to the District's recalcitrance, and when it was clear that the District was making no progress towards compliance with the decree and that children were in danger. See *LaShawn A.*, 887 F. Supp. at 298.

[16]All of those appeals are being held in abeyance, pursuant to the District's requests, pending this Court's resolution of the Petition.

and statutory rights. Judge Hogan based liability on violations of multiple provisions of several federal statutes and the constitutional rights of the respondent foster children.

Judge Hogan's ruling on the constitutional issue was sound. The district judge relied on *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), and this Court's analysis of *Youngberg* in *DeShaney* v. *Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989), to properly conclude that children placed in foster care custody by the District, like involuntarily committed mental patients, have a Due Process right to "reasonably safe placements in which they will not be harmed." Pet. App. at 71a.[17]

Petitioners suggest that *Suter* v. *Artist M.*, 503 U.S. 347 (1992), undermines the children's federal statutory claims, but they overread that decision. *Suter's* holding that 42 U.S.C. § 671(a)(15) is not enforceable under 42 U.S.C. § 1983 rested on the vagueness of the "reasonable efforts" language in that statutory subsection.[18]

---

[17]The District incorrectly asserts that the *LaShawn I* panel implicitly ruled that respondents' constitutional claims were insubstantial and that Judge Hogan failed to find facts sufficient to support a Due Process violation. Pet. at 9 n.6. First, the D.C. Circuit never ruled on the constitutional claims. See Pet. App. at 92a ("It is not necessary to reach the complex constitutional and federal statutory issues in this case."). Second, Judge Hogan expressly found that the District had "failed to protect [] plaintiffs from harm -- whether physical, psychological, or emotional -- by failing to place plaintiffs appropriately, failing to prepare case plans, failing to monitor placements, and failing to ensure permanent homes, among other things." Pet. App. at 78a.

[18]This is apparent from the fact that the Court in *Suter* (continued...)

The single statutory subsection at issue in *Suter* was only one of numerous federal statutes on which Judge Hogan based liability.[19] For example, Judge Hogan found that the District had violated federal statutory mandates requiring the District:

-- to maintain a written "case plan" "(as defined in [42 U.S.C. § 675(5)(A)] * * *) for each child receiving foster care," 42 U.S.C. §§ 622(b)(9)(B)(ii) & 671(a)(16);

-- to assure that "the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review," 42 U.S.C. § 675(5)(B); and

-- to hold -- "no later than eighteen months after the original placement" of a child -- a "dispositional hearing" at which "the future status of the child (including, but not limited to, whether

---

[18](...continued)
distinguished -- rather than overruling -- *Wilder* v. *Virginia Hospital Ass'n*, 496 U.S. 498 (1990) (which held that the "reasonable rates" requirement of the state-plan provision of the Medicaid Act created rights enforceable under § 1983), explaining that the Medicaid Act and its regulations "set forth in some detail the factors to be considered in determining the methods for calculating rates." *503 U.S. at 360.* See also *Blessing* v. *Freestone*, 65 U.S.L.W. 4265, 4268 (U.S. Apr. 21, 1997) (conducting *Wilder* analysis); *White ex rel. White* v. *Chambliss*, 1997 U.S. App. LEXIS 9288, at *21 n.4 (4th Cir. Apr. 30, 1997) ("*Suter* itself was not a novel holding, but rather rested upon settled legal principles * * * .").

[19]The reach of *Suter*, which involved this Court's evaluation of congressional intent, was subsequently limited by Congress to the one statutory subsection at issue therein. See 42 U.S.C. § 1320a-2 (codified as amended Oct. 20, 1994); 42 U.S.C. § 1320a-10 (codified as amended Oct. 31, 1994) (second enactment of same statutory language).

the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis) * * *." 42 U.S.C. § 675(5)(C); see also § 42 U.S.C. § 622(b)(9)(B)(ii) incorporating by reference 42 U.S.C. § 675(5)(C).[20]

These provisions are specific enough to be enforceable under 42 U.S.C. § 1983. Thus, contrary to the District's claims, with the single exception of § 671(a)(15), *Suter* does not implicate the numerous federal statutory provisions on which -- in addition to constitutional and local law -- petitioners' liability was originally based.[21]

The strength of these federal statutory and constitutional claims provides ample grounds for the Court to deny *certiorari*. Even if the Court had concerns about the exercise of pendent jurisdiction here, liability would remain independently

---

[20]See also Pet. App. at 153a n.13 (Randolph, J., dissenting) (listing eight separate federal statutory adjudications).

[21]See *Marisol A.*, 929 F. Supp. at 682-84 (holding that, notwithstanding *Suter*, §§ 627 (now § 622), 671(a)(10) & (16), and 5106a(b)(2) are enforceable under § 1983); *Jeanine B. ex rel. Blondis* v. *Thompson*, 877 F. Supp. 1268, 1281-86 (E.D. Wis. 1995) (sustaining claims under the same multiple statutory sections as plaintiffs herein prevailed upon, with single exception of 42 U.S.C. § 671(a)(15)). But see *Doe ex rel. Fein* v. *District of Columbia*, 93 F.3d 861, 867 (D.C. Cir. 1996) (§ 5106a(b)(2) not enforceable under § 1983); *Tony L.* v. *Childers*, 71 F.3d 1182, 1189 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1834 (1996) (same); *White*, 1997 U.S. App. LEXIS at *21 (§ 671(a)(10) not enforceable under § 1983). *Doe*, *Tony L.*, and *White* all involved individual plaintiffs seeking money damages.

supported by the numerous federal adjudications. Petitioners would therefore still be bound by the terms of the consent decree.[22]

III. THE SIGNIFICANCE OF THIS CASE IS FURTHER DIMINISHED BECAUSE THE ISSUE OF PENDENT JURISDICTION IS NOW GOVERNED BY STATUTE.

This Court would have to substantially rewrite the *Gibbs* doctrine in order to achieve the result petitioners desire. For the reasons discussed above, compelling arguments favor allowing the judgment of the court below to stand and declining petitioners' invitation to make comity towards municipalities into a singular overriding factor barring the exercise of pendent jurisdiction over the District of Columbia.

A grant of *certiorari* would be inappropriate for the additional reason that pendent jurisdiction (renamed "supplemental jurisdiction") is now governed by federal statute. See 28 U.S.C. § 1367 (text reprinted in Appendix). Section 1367 is not decisive here because it applies only to cases filed after December 1, 1990. *Id.*

The scope of this federal statute in light of pre-existing law is not yet settled. Several courts and commentators have concluded that § 1367 changes the *Gibbs* doctrine by restricting the court's discretion to decline to exercise supplemental

---

[22]While the end result would be clear, however, the proceedings on remand would likely include extensive additional briefing and argument in the district court, followed by additional appeals, in a case in which liability was established on the basis of an overwhelming factual record in 1991, and there already have been protracted appellate proceedings.

jurisdiction. See *Executive Software North America, Inc.* v. *U.S. District Court*, 24 F.3d 1545, 1552 (9th Cir. 1994) (§ 1367 "channels the district court's discretion to identify new grounds for declining jurisdiction more particularly than the preexisting doctrine"); *McLaurin* v. *Prater*, 30 F.3d 982, 985 (8th Cir. 1994) ("in the absence of the circumstances described in subsections (b) and (c), § 1367(a) requires the district court to accept supplemental jurisdiction * * *.").[23] On the other hand, some courts have suggested that § 1367 was meant to codify the *Gibbs* doctrine.[24]

Whether or not the statute changes the law of pendent jurisdiction, it makes a grant of *certiorari* in this case inappropriate. If the statute modifies the *Gibbs* doctrine, then the importance of this case is plainly diminished. If the statute codifies *Gibbs*, then the statute makes clear that the *Gibbs* doctrine gives the federal courts the discretion to exercise pendent jurisdiction in this case. The statute commands the federal courts to exercise jurisdiction over local law claims, except in certain exceptional circumstances when district courts are permitted -- not compelled -- to decline to exercise that

---

[23]See also *Palmer* v. *Hospital Auth.*, 22 F.3d 1559, 1563 (11th Cir. 1994) (the "scope [of § 1367] is somewhat different than the *Gibbs* tests"); 13B Charles Alan Wright *et al.*, Federal Practice and Procedure § 3567.1 at 24 (Supp. 1996) (describing Ninth Circuit's analysis of § 1367(c) and how it relates to prior case law as "persuasive"); 16 Robert C. Casad *et al.* Moore's Federal Practice § 106.61 at 106-78 (3d ed. 1997) ("A district court no longer possesses discretion to refuse to exercise supplemental jurisdiction on grounds not enumerated in the statute.").

[24]See *Brazinski* v. *Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1181-82 (7th Cir. 1993) (legislative history indicates an intent to codify prior law); *Borough of West Mifflin* v. *Lancaster*, 45 F.3d 780, 788 (3d Cir. 1995) (same).

power. See 28 U.S.C. § 1367(a) (district courts "shall have supplemental jurisdiction over all other claims," except as otherwise provided); *id.* at § 1367(c) (enumerating circumstances in which district court "may" decline to exercise supplemental jurisdiction). The statute certainly does not require federal courts to decline to exercise jurisdiction over local law claims simply because the defendant is a municipality. Thus the statute either (1) codifies and expands the pre-existing doctrine supporting the exercise of pendent jurisdiction herein, or (2) wholly supplants that doctrine, rendering a decision herein inapplicable to future cases. Either way, a decision in this case would be both exceedingly fact-specific and doctrinally anachronistic.

IV. THE DISTRICT IS BOUND BY ITS AGREEMENT TO THE CONSENT DECREE.

The second issue petitioners present -- whether the consent decree should have been vacated because it exceeds the requirements of District law -- does not merit this Court's review. The District negotiated and consented to be bound by a decree that exceeded the requirements of federal law (and, necessarily, the parallel requirements of D.C. law). The decree as slightly modified by Judge Hogan on remand did not extend beyond District law any more than it extended beyond federal law. Accordingly, following *en banc* review, the *LaShawn II* panel correctly held that "the substitution of District law alone as the basis of the decree, in place of reliance on federal plus District law, did not materially undermine the District's consent." Pet. App. at 1a-2a. The District does not attempt to demonstrate that the decree does in fact extend beyond District law more than it extends beyond federal law. In agreeing to the terms of a settlement or remedial decree, a municipality is perfectly capable of agreeing to do more than the law absolutely requires in order to remedy the legal violation. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 389 (1992). The District

did just that in this case, and its later regret does not provide a worthy basis for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

MARCIA ROBINSON LOWRY*
CRAIG LEVINE
CHILDREN'S RIGHTS, INC.
404 Park Avenue South, 11th Floor
New York, New York 10016
(212) 683-2210 (ext. 324)

THOMAS J. MIKULA
SUSAN L. PACHOLSKI
A. CHRISTOPHER BRYANT
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

Of Counsel
ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION
OF THE NATIONAL CAPITAL AREA
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

May 9, 1997

*Counsel of Record

APPENDIX

28 U.S.C. § 1367

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

* * *

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if --

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

* * *

(e) As used in this section, the term "State" includes the District of Columbia * * *.